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Washington, DC
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December 30, 1996

Mr. William F. Caton
Secretary
Federal Communications Division
1919 M Street N.W., Room 222
Washington, D.C. 20554

Re: In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, CS Docket No. 96-85

Dear Mr. Caton:

Please file the attached ex parte letter in the docket of the above-captioned proceeding. Kindly address any questions regarding this filing to the undersigned.

Thank you.

Sincerely,

Francis M. Buono

Francis M. Buono

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384
202 328 8000

Telex: RCA 229800
WU 89-2762
Fax: 202 887 8979

WILLKIE FARR & GALLAGHER

Michael H. Hammer Washington, DC
New York
London
Paris

December 30, 1996

Mr. Tom Power
Assistant Division Chief, Policy and Rules
Cable Services Bureau
Federal Communications Division
2033 M Street, N.W.
Washington, D.C. 20554

Re: Meeting Competition Defense for MDU Pricing, CS Docket No. 96-85

Dear Mr. Power:

This letter is submitted on behalf of Tele-Communications, Inc. ("TCI") in response to your inquiry as to how a "meeting competition" test could operate as an irrebutable defense under Section 623(d) of the Communications Act without allowing cable operators to set prices in MDUs which are "predatory" and, therefore, prohibited by Section 623(d). Specifically, you asked whether MDU prices set by cable operators in order to meet competition might nonetheless be predatory if they were set below cost. As demonstrated below, federal antitrust jurisprudence holds that where an entity sets a price to meet competition, that price, by definition, is not "predatory," even if it is below the entity's cost. Thus, for the following reasons, TCI proposes that any determination of whether a cable operator's MDU price is predatory under Section 623(d) should incorporate an irrebutable "meeting competition" defense.[1]

- As the Supreme Court has recognized, Congress passed the Robinson-Patman Act to specifically

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[1] See also TCI's Comments filed in the above-captioned proceeding on June 4, 1996, at 19-23, for a further discussion of and justification for adoption of a meeting competition defense with respect to cable MDU pricing.

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address predatory pricing.[2] Yet, under the Robinson-Patman Act, "meeting competition" is an irrebutable defense to any accusation of predatory price discrimination,[3] even if such pricing is below cost.[4] Thus, such a defense should be recognized by the Commission in the analogous context of Section 623(d).

- That the "meeting competition" test functions as an irrebutable defense reflects the fact that, irrespective of cost, the term "predatory," as defined in antitrust case law, necessarily excludes pricing to meet competition. As the Supreme Court recently determined, predatory pricing exists only where "[a] business rival has priced its products in an unfair manner with an object to eliminate or retard competition."[5] The "meeting competition" defense simply recognizes, as the federal courts have, that where one has demonstrated that its pricing is in response to the prior pricing behavior of a competitor, the requisite intent to eliminate or retard competition is lacking.[6] Therefore, such pricing

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[2] United States v. National Dairy Products Corp., et al., 372 U.S. 29, 34 (1963) (stating that "the [Robinson-Patman] Act was aimed at a specific weapon of the monopolist -- predatory pricing.").

[3] See 15 U.S.C. § 13(b); Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 248-251 (1951).

[4] See H.R. Rep. No. 627, 63d Cong., 2d Sess. 8, 16 (1914) (recognizing that the Robinson-Patman Act was aimed at pricing "below the cost of production" but nonetheless adopting the irrebutable "meeting competition" defense).

[5] Brooke Group Ltd. v. Brown & Williamson, 509 U.S. 209, 222, reh'g denied, 509 U.S. 940 (1993) (emphasis added).

[6] See, e.g., Times-Picayune Publishing Co. et al. v. United States, 345 U.S. 594, 623 (1953) (noting that pricing
(continued ...)

behavior, by definition, cannot be considered predatory, regardless of whether or not the price is below cost.[7]

- This recognition is consistent with the more general federal court conclusion that not all below-cost pricing is for a predatory purpose.[8]

(... continued)

to meet competition is inconsistent with an anticompetitive intent); Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1035 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982) ("[p]redation exists when the justification of [] prices is based . . . on their tendency to eliminate rivals . . . and not rigid adherence to a particular cost-based rule").

[7] See In re IBM Peripheral EDP Devices Antitrust Litigation, 481 F.Supp. 965, 995 (N.D. Cal. 1979), aff'd 698 F.2d 1377 (9th Cir. 1983), cert. denied, 464 U.S. 955 (1983) (stating that below-cost pricing may be justified by such things as meeting competition); Lormar, Inc. v. Kroger Co., 1979-1 Trade Cas. (CCH) ¶ 62,498, 76,911 (S.D. Ohio 1979) (finding that below-cost pricing lacks requisite predatory intent if for the purpose of meeting competition). See also Knuth v. Erie-Crawford Dairy Cooperative Assn., 326 F. Supp. 48, 52-53 (W.D. Pa 1971) ("To hold that a seller is helpless and must stand by watching its business being destroyed would be a perversion of the result sought to be obtained by the Sherman Act. The antitrust laws were designed to encourage competition and to prevent predatory action. To outlaw the action of the Co-Op in defending its markets by the time-honored and legally sanctioned method of meeting competition would be to turn the shelter of the antitrust legislation into a weapon which would kill free enterprise instead of protecting and promoting it") (citations omitted).

[8] See Brooke Group Ltd. v. Brown & Williamson, 509 U.S. at 225 ("Evidence of below-cost pricing is not alone sufficient to" establish predation); Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d at 1034

(continued ...)

> The tendency among federal courts to nonetheless focus on cost in determining whether or not pricing is predatory simply reflects the fact that the vast majority of courts now require evidence of below-cost pricing as a necessary element to establish a prima facie case of predatory pricing, which can then be rebutted by demonstrating an intent to meet, but not undercut, a competitor's previously established price.[9] Thus, no federal court has ever found a pricing practice to be predatory where a meeting competition defense has been established.

TCI respectfully urges the Commission to adopt an irrebuttable meeting competition defense as part of its MDU cable pricing rules. In addition to being supported by the well-established judicial precedent discussed above, this defense would afford MDU subscribers the benefits of vigorous competition for video services, while avoiding entangling the Commission in numerous complex, costly, and time-consuming rate cases.

Sincerely,

Michael H. Hammer /FMB

Michael H. Hammer
Attorney for TCI

cc: Meredith Jones
John Logan
JoAnn Lucanik
William F. Caton

(... continued)

("[p]ricing below average total cost may be a legitimate means of minimizing losses").

[9] See, e.g., Brooke Group Ltd., v. Brown & Williamson, 509 U.S. at 223; Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977).